Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

BETWEEN:

LESLIE PALM

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 500 AND

CLIFF WILLICOME AND RICHARD WILKINSON

Respondents

RULING

Wallace G. Craig
Tribunal Member

2011 CHRT 12
2011/09/09

[1] On March 6, 2009, Leslie Palm filed five separate complaints of discrimination, alleged to have occurred in February and March 2008, against British Columbia Maritime Employers Association ("BCMEA") and Western Stevedoring Ltd ("Western") (together, the "Employer Respondents"), Local 500 of the International Longshore & Warehouse Union (the "Union"), Richard Wilkinson and Cliff Willicome (together, the "Remaining Respondents").

[2] Pursuant to section 47 of the *Canadian Human Rights Act* ("*CHRA*"), the Canadian Human Rights Commission ("Commission") appointed a conciliator in an attempt to bring about a settlement of the complaints. On January 7, 2011, Ms. Palm agreed to settle with two of the five respondents, the BCMEA (claim numbered 2008 1276), and Western (claim numbered 2008 1277). Pursuant to section 48 of the *CHRA,* the settlement agreements (collectively, the "Settlement") were referred to and approved by the Commission.

[3] On June 14, 2011, the Remaining Respondents applied for disclosure of the minutes of the Settlement, claiming that the Settlement is not privileged and that its terms are relevant to the complaints against them.

[4] Ms. Palm, who is not represented by counsel, opposes any disclosure of the Settlement.

[5] The Employer Respondents accept that there should be disclosure of the Settlement terms relating to damages for lost wages or expenses, and releases of liability of Mr. Wilkinson and Mr. Willicome. They argue that this disclosure should be made to the Canadian Human Rights Tribunal (the "Tribunal") only, and not to the Remaining Respondents. The Employer Respondents oppose any disclosure of the Settlement terms relating to non-pecuniary damages and any provisions relating to systemic remedies.

[6] The Commission opposes disclosure of the Settlement, but argues in the alternative that if disclosure is ordered, it should be restricted to the Settlement terms relevant to the issues of lost wages and expenses, and releases of liability of Mr. Wilkinson and Mr. Willicome. The Commission argues that the Settlement is not relevant to non-pecuniary damages and systemic remedies. If disclosure is ordered, the Commission suggests that the "O'Connor" procedure

should be adopted, by which disclosure is made to the Tribunal, who then determines what, if anything, must be produced to the Remaining Respondents.

[7] Careful scrutiny of the five complaints reveals that they are grounded in a two-month period of turmoil at the Vancouver harbour Lynn Terminal East operation of Western. It is not a situation giving rise to discrete allegations of discriminatory conduct engaged in by disconnected respondents. Rather, when viewed together, the complaints portray a work environment with a long and ingrained history of hostility to women.

[8] While the complaints are not identical, they are strikingly similar. For example, each complaint includes specific reference to a report of Vince Ready filed with the Union on January 21, 2009 (the "Ready Report"). Mr. Ready was commissioned by the Union to do a study of discrimination on the waterfront, and relied mainly on confidential interviews with members of the Union and their narrative accounts of experiences on the waterfront. The Employer Respondents did not participate.

[9] There are other similarities, as illustrated, for example, in the following extracts from the complaints against Western and the Union:

> **Western:** "Western ...has discriminated against Ms. Palm on the basis of her sex during her employment at Western, and in particular during the months of February and March of 2008, Western also failed to mitigate in any manner the discriminatory action and gender based harassing behaviours of its male employees directed against Ms. Palm during the months of February and March, 2008."
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> **Union:** "ILWU Local 500 ...has discriminated against Ms. Palm and harassed Ms. Palm on the basis of her sex for the duration of her membership in Local 500, and in particular during the months of February and March of 2008 when she was employed by Western Stevedoring Ltd ...and in a subsequent investigation of discriminatory conduct that occurred at Western conducted by the B.C. Maritime Employers Association ... Local 500 also failed to mitigate in any manner the discriminatory action and sex based harassing

behaviours of its male members directed against Ms. Palm during the months of February and March, 2008."

"Western's Hostile Work Environment"

"...The work environment at Western is directly hostile to women and fosters a culture in which it is acceptable to belittle and undervalue the presence, work product and standing of women as equal parties in the work force because they are women.

A January 2009 report by Vince Ready on Vancouver longshore work environment discrimination against women castigates all parties, including Western, involved in waterfront employment as discriminating against women and creating a female hostile culture. Specific matters that contribute to an environment that systematically discriminates against women include:..." (The complaint goes on to list 11 such matters from the Ready report).

"Hostile Union Work Environment"

"... the environment in Local 500 is directly hostile to women and fosters a culture in which it is acceptable to belittle and undervalue the presence, work product and standing of women as equal parties in the work force, and as members of the union, because they are women.

A January 2009 report by Vince Ready on Vancouver longshore work environment discrimination against women castigates all parties, including local 500, involved in waterfront employment as discriminating against women and creating a female hostile culture. Specific matters that contribute to an environment that systematically discriminates against women include..." (the complaint goes on to list 10 matters from the Ready report, which are virtually identical to those listed in the complaint against Western).

[10] On June 15, 2009, the executive of the Union adopted the Ready Report and recommendations, two of which are relevant to this proceeding:

> "...that the Union and the Employer develop an adapted grievance procedure to address grievances, which include alleged breaches of the Human Rights Act; and
>
> "...that the Union seek to amend the Collective Agreement to reflect its position regarding the elimination of harassment and discrimination."

It is noteworthy that Mr. Ready prefaced his recommendations as follows:

> "Before delving into my recommendations, I also feel compelled to observe that the overall approach to curing the current atmosphere on the Vancouver Waterfront ought to be a joint process with the Employer. I make this observation regardless of the fact that it is the Employer that has the legal obligation to provide a workplace free from harassment and discrimination."

[11] The Remaining Respondents' motion for disclosure sets out the following summary of facts:

- Ms. Palm's complaints against the Employer Respondents and the Remaining Respondents were all filed on March 6, 2009 and are in large measure the same.
- The BCMEA owns and operates the Vancouver Despatch Hall through which Union members and casual employees aspiring to Union membership acquire work. The majority of jobs are staffed as a result of daily dispatch, but under the collective agreement a company may request a worker on a regular work force (RWF) basis. The worker then reports directly to that company for one year.
- At the relevant times, Ms. Palm, Mr. Wellicome and Mr Wilkinson were RWF employees at Western Stevedoring, a member company of the BCMEA.
- Ms. Palm and her partner Mr. Russo were the two steel drivers. Mr Wellicome and Mr Wilkinson and ten others were pulp drivers.

- The steel drivers' shift began an hour earlier than the regular hours of work so they typically received an hour of overtime each weekday.

- The assignment of weekend overtime work was based on the number of hours the employee had worked that week – the worker with the lowest number of hours during the week was the first person assigned to weekend overtime.

- In or around February of 2008 a controversy between steel drivers and pulp drivers developed over access to overtime work. This was the result of work slowing down on the docks due to the economic downturn.

- The steel drivers stopped getting as many early starts and were thus higher on the list for weekend work. Since less weekend work was available, some pulp drivers were not called in and yet Ms. Palm or Mr. Russo were called.

- At several meetings of the RWF there were heated discussions regarding the overtime allocation system. Ms. Palm's complaint concerns this time period.

- On May 28, 2008 Ms. Palm wrote a letter to Western Stevedoring's Health and Safety Administrator alleging harassment by her co-workers. There was no allegation of gender discrimination or that the alleged harassment was related to gender. Western Stevedoring undertook an investigation into Ms. Palm's complaint.

- On September 2, 2008 the BCMEA provided a final report on the harassment complaint investigation to the Union. The investigation found that Mr. Wilkinson had incorrectly recorded Ms. Palm's hours; that Mr. Wellicome told Ms. Palm to "fuck off"; that some RWF pulp drivers exerted a significant amount of pressure on Ms. Palm and any other driver that did not agree with them, but that there was "no evidence or allegation that this conduct was discriminatory as it was not based on any of the prohibited grounds."

- Western Stevedoring wrote a letter of reprimand to Mr. Wellicome for his conduct towards Ms. Palm.

[12] The Remaining Respondents assert that because there is a commonality of circumstances in Ms. Palm's five complaints, the terms of the Settlement with the Employer Respondents are arguably relevant in the case against them, and ought not to be afforded confidentiality, citing *Bushey v. Sharma,* 2003 CHRT 5, and *Groupe d'aide et d'information sur le harcèlement sexuel au travail de la province de Quebec Inc. v. Barbe,* 2003 CHRT 15.

[13] The Commission argues that the Settlement is privileged and disclosure cannot be compelled, citing, among other authorities, section 47(3) of the *CHRA*. Based on the decision in *Barbe*, I am satisfied that section 47(3) of the *CHRA* does not prohibit disclosure of the Settlement itself.

[14] The Employer Respondents maintain that two decisions of the British Columbia Court of Appeal more appropriately express the rule of settlement privilege, and argue that the general rule set out in *British Columbia Children's Hospital v. Air Products Canada Ltd* 2003 B.J.C. No 591 (CA) ("*British Columbia Children's Hospital*") and *Dos Santos (Committee of) v. Sun Life Assurance of Canada* 2005 BCCA 4 ("*Dos Santos*") is that settlement agreements are privileged and should not be disclosed unless they are both relevant and necessary in the circumstances of the case to achieve the overriding interests of justice.

[15] The *Dos Santos* decision affirms that there can be exceptions to the blanket privilege for settlement communications, and sets out the test for establishing such an exception:

> "However, the test for discharging the burden to establish an exception should not be too low. The public policy behind settlement privilege is a compelling one. It is so compelling that even threats arising in the context of settlement negotiations may not justify an exception: *Unilever*, supra at p. 2449-2450.
>
> **To establish an exception in this case, the defendant must show that a competing public interest outweighs the public interest in encouraging settlement. An exception should only be found where the documents sought are both relevant, and necessary in the circumstances of the case to achieve either the agreement of the parties to the settlement, or another compelling or overriding interest of justice."** (emphasis added)

[16] In *Dos Santos,* Chief Justice Finch went on to conclude that the only way to establish objectively what the plaintiff had actually received in compensation for lost earnings was to recognize an exception for the settlement documents that would otherwise have been protected by settlement privilege:

> "Both the relevance and necessity of the documents therefore militate in favour of recognizing an exception.
>
> I have also considered whether recognizing an exception in this case would place a chill on settlement negotiations. I do not believe it would. As in other cases where settlement agreements may have a direct effect on the rights and responsibilities of third parties, the parties to that agreement must be mindful that the confidential nature of their agreement will not be upheld so far as it affect those other parties. ..."
>
> The Chambers judge did not err in holding there was not settlement privilege over the sought documents. An exception to privilege exists in this case."

RULING

[17] I find that the Remaining Respondents have satisfied the test in *Dos Santos*. Given the striking similarities and interconnectedness of Ms. Palm's complaints, I find that the terms of the Settlement are relevant to the complaints against the Remaining Respondents, and necessary to allow the Remaining Respondents to properly prepare their responses to Ms. Palm's claims, and for the Tribunal to make a just decision on the claims, should they proceed to hearing. The Settlement terms relating to releases of liability may directly affect the outcome of Ms. Palm's complaints against Mr. Wilkinson and Mr. Willicome. I find that the Settlement terms relating to both lost wages and non-pecuniary damages are relevant and necessary to guard against the possibility of double recovery with regard to the former, and to allow for some proportionality among these interconnected claims with regard to the latter.

[18] It is clear from the material before me, in particular the excerpted portions of the Ready Report, that systemic discrimination against women on the waterfront is a serious and long-standing problem. Further, as Mr. Ready points out in his report, any solution to the problem must involve both the employer and the union. Any terms of Settlement relating to Ms. Palm's complaint of systemic discrimination are both relevant and necessary to achieve a just result in these circumstances.

[19] The public interest in a fair and judicious disposition of these complaints outweighs the competing public interest in encouraging settlements achieved through blanket confidentiality.

ORDER

[20] I order disclosure of the Settlement to the Remaining Respondents, such disclosure to be made in the following manner:

a) Within fourteen days after the release of this ruling, Harris & Company, lawyers for the Employer Respondents, shall provide a copy of the Settlement to Caroline & Gislason, lawyers for the Remaining Respondents;

b) Neither Caroline & Gislason nor the Remaining Respondents shall use the copy of the Settlement for any purpose other than the hearing or settlement of Ms. Palm's complaints against the Remaining Respondents;

c) Caroline & Gislason shall be permitted to communicate the terms of the Settlement orally to the Remaining Respondents. Caroline & Gislason shall not make copies of the copy of the Settlement, and neither Caroline &Gislason nor the Remaining Respondents shall communicate the terms of the Settlement to anyone, other than in the course of the hearing or settlement of Ms. Palm's complaints against the Remaining Respondents; and

d) Caroline & Gislason shall return the copy of the Settlement to Harris & Company within seven days of the determination of Ms. Palm's complaints against the Remaining Respondents.

[21] This ruling and order relate only to the question of the production of the Settlement. Its ultimate admissibility will have to be determined by the member hearing the case.

Signed by

Wallace G. Craig

OTTAWA, Ontario
September 9, 2011

CANADIAN HUMAN RIGHTS TRIBUNAL

PARTIES OF RECORD

TRIBUNAL FILE:	T1625/17110, T1626/17210, T1627/17310
STYLE OF CAUSE:	Leslie Palm v. International Longshore and Warehouse Union, Local 500 and Cliff Willicome and Richard Wilkinson
RULING OF THE TRIBUNAL DATED:	September 9, 2011
APPEARANCES:	
Leslie Palm	For the Complainant
Ikram Warsame	For the Canadian Human Rights Commission
Lyndsay Watson	For the Respondent
Patricia Janzen	For the British Columbia Maritime Employer's Association